

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96966; File No. SR-NASDAQ-2023-004)

February 22, 2023

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Fees the Exchange Charges Companies Seeking Review of a Delisting Determination, Public Reprimand Letter, or Written Denial of an Initial Listing Application

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on February 10, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the fees the Exchange charges companies seeking review of a delisting determination, public reprimand letter, or written denial of an initial listing application.

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The Nasdaq Stock Market LLC Rules

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¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

5815. Review of Staff Determinations by Hearings Panel

When a Company receives a Staff Delisting Determination or a Public Reprimand Letter issued by the Listing Qualifications Department, or when its application for initial listing is denied, it may request in writing that the Hearings Panel review the matter in a written or an oral hearing. This section sets forth the procedures for requesting a hearing before a Hearings Panel, describes the Hearings Panel and the possible outcomes of a hearing, and sets forth Hearings Panel procedures.

(a) Procedures for Requesting and Preparing for a Hearing

(1) - (2) No changes.

(3) Fees

Within 15 calendar days of the date of the Staff Delisting Determination, Public Reprimand Letter, or written denial of an initial listing application, the Company must submit a hearing fee of [~~\$10,000~~]\$20,000. However, if the hearing request relates to a Staff Delisting Determination dated on or before February 10, 2023, the Company must submit a hearing fee of \$10,000.

(4) – (6) No changes.

(b) – (d) No changes.

5820. Appeal to the Nasdaq Listing and Hearing Review Council

A Company may appeal a Panel Decision to the Listing Council. The Listing Council may also call for review a Panel Decision on its own initiative. This Rule 5820 describes the procedures applicable to appeals and calls for review.

(a) Procedure for Requesting Appeal

A Company may appeal any Panel Decision to the Listing Council by submitting a written request for appeal and a fee of [~~\$10,000~~]\$15,000 to the Nasdaq Office of Appeals and Review within 15 calendar days of the date of the Panel Decision. However, if the appeal relates to a Panel Decision dated on or before February 10, 2023, the applicable fee is \$10,000. An appeal will not operate as a stay of the Panel Decision. Upon receipt of the appeal request and the applicable fee, the Nasdaq Office of Appeals and Review will acknowledge the Company's request and provide deadlines for the Company to provide written submissions.

(b) – (e) No changes.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Nasdaq Listing Rule 5815, companies may seek review of a determination by the Nasdaq's Listing Qualifications Department ("LQ Staff") to deny initial listing or delist a company's securities or to issue a Public Reprimand Letter, by requesting a hearing before an independent Hearings Panel (the "Hearings Panel"). Listing Rule 5815(a)(3) provides that to request a hearing, the company must, within 15 calendar days of the date of the LQ Staff delisting determination, public reprimand letter, or written denial of an initial listing application,

submit a hearing fee in the amount of \$10,000. Companies may also appeal a Hearings Panel decision to the Nasdaq Listing and Hearing Review Council (the “NLHRC”). Listing Rule 5820(a) requires a company seeking such an appeal to submit a fee of \$10,000. Nasdaq last changed these fees in 2013.³ Nasdaq now proposes to increase the fee for review by a Hearings Panel to \$20,000 and the fee to appeal a Hearings Panel decision to the NLHRC to \$15,000. Nasdaq is increasing the fees because the costs incurred in preparing for and conducting hearings and appeals have increased since the fees were last changed.

The costs of the review process include significant time and resources to maintain the infrastructure for the processes and to prepare for and conduct individual hearings and appeals. For example, with respect to review by the Hearings Panels, Nasdaq incurs expenses related to the Nasdaq staff that facilitates the hearings and provides legal counsel and support to the independent Hearings Panel members, the honorarium paid to the Hearings Panel members, and the cost of maintaining a transcript of the hearing. LQ Staff reviews each company’s submissions to the Hearings Panel and provides the Hearings Panel with its analysis of the company’s plans; LQ Staff also provides written submissions in support of the delisting, listing denial, or Public Reprimand determination. In addition, in some matters LQ Staff attends hearings to respond to presentations by the company and answer questions from the Hearings Panel members. Where hearings are held in person, Nasdaq also incurs expenses related to securing and maintaining a location for the hearings and travel expenses for Hearings Panel members. Staff also must manage and coordinate the Hearings Panel dockets, maintain the systems that track hearing matters, draft initial decisions for review by the Hearings Panel

³ Securities Exchange Act Release No. 68676 (January 16, 2013) 78 FR 4914 (January 23, 2013) (approving [sic] SR-NASDAQ-2013-004).

members, and monitor post-hearing compliance efforts in matters where the Hearings Panel has granted the company a period of time to cure a deficiency.

There are also additional costs associated with the NLHRC review of every Hearings Panel decision, in determining whether to call that decision for review as described in Rule 5820(b). In that regard, Nasdaq incurs expenses related to the Nasdaq staff that facilitates the call for review process and that provides legal counsel and support to the NLHRC members, as well as the honorarium paid to the NLHRC members. When a matter is called for review, Nasdaq also incurs costs related to the staff in the Listing Qualifications Department, which reviews the company's submissions to the NLHRC and provides the NLHRC with LQ Staff's analysis of the company's plans and any issues identified by the NLHRC in its call for review. Nasdaq staff also must manage and coordinate the NLHRC docket, maintain the systems that track call for review matters, and draft initial decisions for review by NLHRC members. Nasdaq believes that these additional costs for the call for review process are appropriately considered as part of the cost of the Hearings Panel review, since every Hearings Panel decision is subject to review by the NLHRC and the decision as to whether to call a matter for review rests with the NLHRC.

Where a company appeals a matter to the NLHRC, there are similar additional costs as well, which Nasdaq believes should be borne by the company through the appeal fee. Specifically, like where a decision is called for review, when a company appeals a decision Nasdaq incurs expenses related to the Nasdaq staff that facilitates the process and that provides legal counsel and support to the NLHRC members, the honorarium paid to the NLHRC members, LQ Staff review and analysis of the company's submissions to the NLHRC,

management of the docket, maintaining the systems that track NLHRC appellate matters and drafting the initial decisions for review by NLHRC members.

Throughout the hearing and NLHRC process, the Exchange incurs costs to maintain and upgrade its electronic systems for tracking companies and maintaining a clear record, as required by Nasdaq and SEC rules.⁴ It also maintains lists on its website, updated every business day, that reflect the status of all companies in the deficiency process⁵ and frequently asked questions providing transparency to companies and investors about the delisting and deficiency process, as well as the initial listing process.⁶

All of these expenses have increased in the ten years since the fees were last changed in 2013. In addition, due to changes in procedures over time, Nasdaq devotes more staff time and resources to certain matters.⁷ Accordingly, Nasdaq proposes to increase the fee to request review by a Hearings Panel to \$20,000 and the fee for an appeal to the NLRHC to \$15,000. Nasdaq

⁴ See Nasdaq Rule 5840(a). See also Rule 420(e) of the SEC Rules of Practice, 17 CFR 201.420(e) which requires Nasdaq to certify and file a copy of the record upon which a delisting or denial was based where the company requests Commission review of Nasdaq's action.

⁵ See <https://listingcenter.nasdaq.com/IssuersPendingSuspensionDelisting.aspx> and <https://listingcenter.nasdaq.com/NonCompliantCompanyList.aspx>.

⁶ See https://listingcenter.nasdaq.com/Material_Search.aspx?mcd=LQ. Users can view more than 30 Frequently Asked Questions about the hearings and appeals processes and hundreds more about the processes associated with specific listing_rule deficiencies. In addition, there are summaries of over 100 prior NLHRC decisions.

⁷ For example, in October 2020 the Commission approved changes to the procedures governing the introduction of information during the hearing process. As a result, whereas previously companies typically provided a single submission to the Hearings Panel, companies now typically submit both a Written Submission and a Written Update to the Hearings Panel, and LQ Staff must review and react to each. See Rule 5815(a)(5) and Securities Exchange Act Release No. 90201 (October 15, 2020) 85 FR 67024 (October 21, 2020) (approving SR-NASDAQ-2020-002).

believes that this is an equitable allocation based on the expenses incurred in connection with each portion of the overall appellate process.

The revised fees for a hearing will be applicable to issuers that are sent a delisting determination, public reprimand letter, or written denial of an initial listing application after February 10, 2023, the date of filing of this proposed rule change. Similarly, the revised fees for an appeal of a Hearings Panel decision to the NLHRC will be applicable to issuers that receive a Hearings Panel decision after February 10, 2023. The current fees will remain in effect for any company that received a Staff delisting determination, denial of a listing application, or public reprimand letter, or a Hearings Panel decision on or before February 10, 2023.⁸

The revised fees will allow Nasdaq to recoup a portion of the expenses it incurs in the review and appeal processes that will more closely approximate its actual costs associated with those processes. The Exchange has reviewed all costs associated with delisting appeals and does not expect or intend that the fees will exceed the costs.⁹

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹¹ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among

⁸ Companies are notified about their ability to request a hearing, and the fees associated with such a hearing, in the Staff determination letter. They are notified of the fees associated with an appeal in the Hearings Panel decision, which also includes a notice of the right to appeal. As proposed, Nasdaq would only charge the new fee to companies that were not already advised of the prior fee in the applicable decision letter.

⁹ A precise cost-per-hearing analysis is not possible given the need to maintain an infrastructure for which the Exchange incurs expenses irrespective of the number of hearings or appeals requested in a given year.

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the proposed fee increase is reasonable because it will better reflect Nasdaq's costs related to hearings and appeals. Nasdaq has not increased these fees since 2013,¹² but its costs have increased since that time. The fees will help offset the costs of conducting hearings and appeals, which serve to ensure that Nasdaq's listing standards are properly enforced for the protection of investors. The proposed changes are equitable and not unfairly discriminatory because they would apply equally to all companies that choose to request a hearing for review of a delisting determination, public reprimand letter or denial of initial listing, or to appeal a Hearings Panel decision. In addition, aligning the fees for hearings with the underlying costs of the review process is equitable because doing so will help minimize the extent that companies that are compliant with all listing standards may subsidize the costs of review for companies that are non-compliant.

Nasdaq also believes that the proposed fees are consistent with the investor protection objectives of Section 6(b)(5) of the Act¹³ in that they are designed to promote just and equitable principles of trade, to remove impediments to a free and open market and national market systems, and in general to protect investors and the public interest. Specifically, the fees are designed to provide adequate resources for appropriate preparation to conduct reviews of Nasdaq Listing Qualifications' staff determinations and appeals of Hearings Panel decisions, which help to assure that the Exchanges' listing standards are properly enforced and investors are protected.

¹² Securities Exchange Act Release No. 68676, supra.

¹³ 15 U.S.C. 78f(b)(5).

Nasdaq also believes that the proposed changes are consistent with Section 6(b)(7) of the Act,¹⁴ in that the proposed fees are consistent with the provision by the Exchange of a fair procedures for the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange. In particular, the Exchange believes that the proposed amended fees should not deter listed issuers from availing themselves of the right to appeal because the fees will still be set at a level that will be affordable for listed companies. Nasdaq does not believe that the proposed fee is unduly burdensome or would discourage any company from seeking a hearing or appeal.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. As discussed above, this proposed fee is based on the increase in costs to the Exchange to provide a delisting review process, which is in turn necessary to ensure investor protection as well as a transparent process for issuers. Moreover, the market for listing services is extremely competitive and listed companies may freely choose alternative venues based on the aggregate fees assessed, and the value provided by each listing. This rule proposal does not burden competition with other listing venues, which are similarly free to align their fees on the costs incurred by the process they offer. For this reason, and the reasons discussed in connection with the statutory basis for the proposed rule change, Nasdaq does not believe that the proposed rule change will result in any burden on competition for listings.

¹⁴ 15. U.S.C. 78f(b)(7).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and paragraph (f)(2) of Rule 19b-4 thereunder.¹⁶ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2023-004 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(2).

All submissions should refer to File Number SR-NASDAQ-2023-004. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-NASDAQ-2023-004, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Sherry R. Haywood

Assistant Secretary

¹⁷ 17 CFR 200.30-3(a)(12).